

The ALJ, relying on the report and testimony of psychologist Dr. Robert W. Barnett, found claimant's dysthymic disorder arose out of and in the course of her employment with respondent and authorized psychological treatment. Dysthymic disorder in layman's terms is long-term minor depression. The ALJ denied claimant's request for temporary partial and temporary total disability benefits because the only documented injury during the time period for which temporary partial disability benefits were requested was a scheduled injury and claimant voluntarily retired from respondent shortly after her left wrist injury. ALJ Sanders designated Dr. James Eyman as claimant's authorized treating physician.

Respondent appeals for the reasons set out above. On appeal, claimant asserts the ALJ erred by not ordering temporary total disability benefits. Claimant also asserts the ALJ erred by appointing Dr. Eyman as claimant's authorized treating physician rather than New Beginnings.

The issues to be determined are:

1. Should the IME report of Dr. Barnett be excluded from the record?
2. Is claimant's psychological condition the direct consequence of her work-related accident and resulting left wrist injury?
3. Did claimant's psychological condition arise out of and in the course of her employment with respondent?
4. If so, did the ALJ err in denying claimant's request for temporary total disability payments?
5. If claimant's psychological condition arose out of and in the course of her employment with respondent, did the ALJ err by appointing Dr. James Eyman as claimant's authorized treating physician rather than New Beginnings?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Claimant testified she injured her left wrist on July 19, 2011, when a file box weighing more than 100 pounds fell on her left hand. On November 1, 2011, Dr. Florin O. Nicolae, a pain management specialist and one of claimant's treating physicians, diagnosed claimant with: (1) chronic and severe left upper extremity pain, paresthesias, edema, and skin discoloration that most likely represents a complex regional pain

syndrome type I of the left upper extremity, (2) depression and (3) anxiety disorder.¹ Dr. Nicolae indicated that an EMG of claimant's upper extremities revealed the presence of a minimal right carpal tunnel syndrome, but nothing was found abnormal on the left. X-rays of claimant's left hand revealed mild osteoarthritis. Dr. Nicolae injected claimant's left wrist with ganglion blocks in an attempt to relieve her symptoms. Claimant has received extensive treatment for her left wrist injury by several doctors including Drs. Nicolae, Zhengyu Hu, Donald T. Mead, Brett E. Wallace, and Scott M. Teeter.

At respondent's request, claimant was also evaluated on December 1, 2011, by Dr. Chris D. Fevurly. He concurred with Drs. Wallace and Nicolae that claimant had complex regional pain syndrome type I. From December 2011 through February 2012, Dr. Hu, a board certified physiatrist, provided treatment for claimant's left wrist pain. He last saw claimant on February 7, 2012, and indicated in a note from that visit that claimant had no signs of reflex sympathetic dystrophy. Because claimant's left hand was bothering her, Dr. Hu prescribed a TENS unit and injected claimant's left wrist with sensory nerve blocks.

Claimant testified that in the 1980s she began seeing therapists at Family Service and Guidance Center for relationship issues. Claimant sought help for anxiety and depression from her second divorce and her treatment ended after approximately one year. The records from Family Service and Guidance Center were not introduced as evidence by the parties.

In the mid-1990s claimant saw Dr. Shimpi because of experiencing anxiety from her third husband's deceptiveness. Claimant testified Dr. Shimpi prescribed anti-depressant medication which claimant continued taking through the date of the preliminary hearing. Sometime between 2000 and 2005, Dr. Shimpi was killed and claimant began seeing Dr. Sheafor. Claimant saw Dr. Sheafor every three months for medical checks. After a fourth divorce, claimant saw Dr. Sheafor in 2005 or 2006. Dr. Sheafor prescribed Xanax, an anti-anxiety medication, which claimant continues to take. In 2009, claimant reduced her visits with Dr. Sheafor to every six months, but continued seeing him until her July 19, 2011, left wrist injury.

In 2004, claimant saw Dr. M. A. Abbott at New Beginnings two or three times for therapy related to a divorce. Because of a relationship problem with her daughter, claimant returned to see Dr. Abbott in August 2010. Claimant's mother died in June 2011, and claimant began having grief problems. Consequently, she saw Dr. Abbott on September 27, 2011. Dr. Abbott's note from that visit indicates claimant was grieving and there were family dynamics issues between claimant, her daughter and claimant's siblings.

¹ P.H. Trans., Cl. Ex. 1.

Following her left wrist injury claimant saw Dr. Abbott on three more occasions in December 2011 and January 2012. Dr. Abbott's note from a December 6, 2011, visit stated claimant was depressed and grieving. That same note indicates claimant did not want to retire due to her injury and they explored claimant's feelings about retirement. A note from the December 22, 2011, appointment mentions claimant has pain in her hand and that claimant's depression was somewhat improved. Only the records of New Beginnings from December 14, 2009, through January 10, 2012, were made part of the record. Claimant was not asked if she reported suffering depression as a result of the left wrist injury to Dr. Abbott.

Claimant was seen at the request of her attorney by Dr. Robert W. Barnett on January 18, 2012. Dr. Barnett is a clinical psychologist, rehabilitation counselor, rehabilitation evaluator and job placement specialist. Of the psychological evaluations Dr. Barnett performs in workers compensation cases, 100% are for claimants. He obtained background information from claimant, conducted a mental health examination, gave the claimant a battery of psychological tests and took a history of claimant's psychological treatment. Dr. Barnett indicated that for several years claimant had been taking anti-depression medications Prozac and Wellbutrin, as well as Xanax for sleep only.

Dr. Barnett's report indicated that prior to claimant's left wrist injury, she was experiencing a grief reaction from her mother's death. He stated in his report that it was noteworthy that seven years had passed between when claimant was treated for the grief reaction over the death of her mother and claimant's left wrist injury. When he testified, Dr. Barnett stated that when he prepared his report, he thought claimant's mother had passed away seven years earlier. Dr. Barnett also testified that at the time of the examination, claimant was not having grief issues related to the death of her mother. However, after learning claimant's mother had passed away only seven months prior to his examination of claimant, Dr. Barnett acknowledged claimant had present and ongoing grief from her mother's death at the time of her left wrist injury.

Dr. Barnett testified that dysthymic disorder is a depressive disorder, which is secondary to some type of loss such as a physical loss or a relationship loss. Two sections of a document known as the DSM-IV were made exhibits to Dr. Barnett's deposition. Dr. Barnett agreed that according to the DSM-IV, the essential feature of dysthymic disorder is a chronically depressed mood that occurs for most of the day, more days than not for at least two years after the loss. Dr. Barnett testified the DSM-IV is used to give a common language, common definition and criteria for various psychological conditions. He also indicated it is "sort of a straw man for research and clinical investigation."² The DSM-IV states that persons with dysthymic disorder describe their mood as sad or "down in the dumps." The document also states that during periods of depressed mood, at least two of the following additional symptoms are present: poor

² Barnett Depo. at 16.

appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness.³

The DSM-IV indicates, “The specific diagnostic criteria included in DSM-IV are meant to serve as guidelines to be informed by clinical judgment and are not meant to be used in a cookbook fashion.”⁴ Dr. Barnett concurred with that part of the DSM-IV.

Claimant was examined by Dr. Barnett less than two years after the left wrist injury. However, he diagnosed claimant with dysthymic disorder because of her chronic condition. The following testimony of Dr. Barnett is significant:

Q. (Mr. Burghart) And you’re not able to state that the dysphoria symptoms and the other psychological complaints she has are directly traceable to the work injury, are you?

A. (Dr. Barnett) I think they’re partially traceable to that but they’re at least in equal amounts traceable to the other various losses she’s experienced.

Q. And when you say “other losses”, what do you mean by that?

A. Loss of employment, loss of her independence. I mean, there’s a lot of things. She had work relationships that she enjoyed. She doesn’t get out every day. If you think in terms of losing your job because of a physical illness or a physical injury, there are all sorts of things that occur that are secondary to that.⁵

In his report Dr. Barnett indicated his opinion was sought by claimant’s counsel on five issues. The two issues that are pertinent are: (1) Is claimant in need of psychological care beyond what was preexisting? (2) Is the work-related injury the prevailing factor regarding the need for treatment?

Dr. Barnett opined claimant “is in need of psychological care beyond what was pre-existing due to her current symptoms of both depression and anxiety.”⁶ He then went on to say, “In my opinion, her predominant issue is dysphoria, secondary to her various losses, including the loss of her job and the loss of function.”⁷ With regard to the issue of prevailing factor, Dr. Barnett opined:

³ *Id.*, Ex. 2.

⁴ *Id.*, Ex. 3.

⁵ *Id.*, at 37-38.

⁶ P.H. Trans., Cl. Ex. 1.

⁷ *Id.*

The symptoms of depression that Ms. Jordan-Cain reported to me during the interview are consistent with the losses she has suffered since her injury. These symptoms certainly can be treated appropriately by a licensed clinical psychologist, as well as through the continued use of her antidepressant and anxiety medication. Given that she reports these symptoms as arising since her injury and various losses, I have no reason to dispute that the injury was the prevailing factor in the emergence of these symptoms, as well as the need for care.⁸

On November 28, 2011, Dr. Brett E. Wallace, one of claimant's treating physicians, dictated a note that stated, "The patient has asked me to indicate that she might need some help with a therapist, specifically to talk about her anxiety or depression that may be associated with her current problem."⁹

Dr. Chris D. Fevurly, an internal medicine and preventive medicine physician, examined claimant on December 1, 2011. He indicated in a letter to respondent's attorney that claimant had a 10- to 15-year history of depressive and anxiety disorders. His opinion was that claimant's psychological disorder preexisted her left wrist injury. He specifically stated claimant's "psychological conditions are not the result of her work event of July 19, 2011."¹⁰

Dr. Zhengyu Hu, a physiatrist, saw claimant six times from December 2011 through February 2012. In a letter dated January 24, 2012, to respondent's attorney, Dr. Hu stated, "Lastly, I don't think the recent injury has affect on her pre-existing psychological problems that happened 10 to 15 years ago."¹¹ Dr. Hu also stated he replaced claimant's prescription of Prozac with Cymbalta, as Cymbalta treated claimant's pain and depression. It was noted by Dr. Hu that while on Cymbalta, claimant had experienced pain relief and improved mood.

At the preliminary hearing, claimant testified that her left wrist injury caused her to feel helpless and hopeless. She stated that prior to the injury she was "doing good, just generally good" emotionally.¹² Claimant testified that on November 1, 2011, she retired from her employment with respondent. She alleged the left wrist injury caused her to retire, and that the retirement was not voluntary. However, claimant admitted no supervisor or boss told her to retire.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*, at 21.

At the preliminary hearing, respondent objected to Dr. Barnett's report being made part of the record because it had received the report one business day prior to the preliminary hearing. ALJ Sanders agreed to leave the record open. She issued an order on February 28, 2012, keeping the record open until she received the deposition transcript of Dr. Barnett. Dr. Barnett's deposition was taken by respondent on March 27, 2012, and ALJ Sanders issued the Preliminary Hearing Order on April 6, 2012.

The ALJ found claimant's work injury was the prevailing factor for her current psychological condition. ALJ Sanders stated in her order that the only psychological expert testimony came from Dr. Barnett, a clinical psychologist. She indicated that Drs. Hu and Feverly are not experts in the field of psychology. Also, the ALJ found the DSM-IV was a guideline and the fact that "Claimant's symptoms do not squarely fit is not as egregious [a] flaw as Respondent contends."¹³ For claimant's psychological condition, ALJ Sanders designated Dr. James Eyman as the authorized treating physician. The ALJ denied claimant's request for temporary partial disability benefits because the only documented injury during the time period for which temporary partial disability benefits were requested was a scheduled injury. She also denied claimant's request for temporary total disability benefits because claimant voluntarily retired.

PRINCIPLES OF LAW AND ANALYSIS

Respondent asserts it was not provided a copy of Dr. Barnett's report until one business day before the preliminary hearing, thus, violating K.S.A. 2011 Supp. 44-534a. The Board does not have jurisdiction to review the ALJ's decision to admit Dr. Barnett's report as evidence. An ALJ's ruling on the admissibility of evidence at a preliminary hearing is not an issue the Board has jurisdiction to review under K.S.A. 2011 Supp. 44-534a nor K.S.A. 2011 Supp. 44-551(i)(2)(A). Therefore, the ruling of ALJ Sanders to admit the report of Dr. Barnett will not be addressed by this Board Member.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.¹⁴ "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."¹⁵

K.S.A. 2011 Supp. 44-508(f)(2)(B) states:

¹³ ALJ Preliminary Hearing Order (April 6, 2012) at 2.

¹⁴ K.S.A. 2011 Supp. 44-501b(c).

¹⁵ K.S.A. 2011 Supp. 44-508(h).

An injury by accident shall be deemed to arise out of employment only if:

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

In *Adamson*¹⁶ and *Love*¹⁷ the Kansas Court of Appeals stated that in order to establish a compensable claim for traumatic neurosis, claimant must show: (1) a work-related physical injury; (2) symptoms of the traumatic neurosis; and (3) that the neurosis is directly traceable to the physical injury.

There is sufficient evidence in the record to establish that at the time of the preliminary hearing claimant had a psychological condition. Claimant's most recent round of psychological issues began with the death of her mother in June 2011. The DSM-IV sets out guidelines for diagnosing psychological conditions. At the time Dr. Barnett diagnosed claimant with dysthymic disorder, she had not endured a two-year period of loss since the death of her mother or her left wrist injury. Nor did Dr. Barnett document or testify that claimant suffered from a chronically depressed mood occurring most of the day, more days than not. Finally, Dr. Barnett did not testify or document that claimant had at least two of the following symptoms following her left wrist injury: poor appetite or overeating, insomnia or hypersomnia, low energy or fatigue, low self-esteem, poor concentration or difficulty making decisions, and feelings of hopelessness. However, as Dr. Barnett testified, and the DSM-IV states, DSM-IV is a guideline. Although there are questions about Dr. Barnett's diagnosis of dysthymic disorder, his diagnosis is uncontroverted. This Board Member finds that claimant has proven she suffered a physical injury to her left wrist and that she has symptoms of a psychological condition.

The underlying issue is whether claimant's left wrist injury was the prevailing factor causing claimant's dysthymic disorder and current need for psychological treatment. There are ample facts that support the position of both parties. Claimant's most formidable argument is that Dr. Barnett opined that claimant's left wrist injury was the prevailing factor causing her psychological condition. However, his testimony and report are often at odds with that opinion. When Dr. Barnett examined claimant, he was unaware that approximately a month before her left wrist injury, claimant's mother passed away. Instead, he thought claimant's mother died seven years earlier. Dr. Barnett also changed his opinion as to grief issues related to the death of claimant's mother.

¹⁶ *Adamson v. Davis Moore Datsun, Inc.*, 19 Kan. App. 2d 301, 868 P.2d 546 (1994).

¹⁷ *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, Syl., 771 P.2d 557, rev. denied 245 Kan. 784 (1989).

The testimony of Dr. Barnett that claimant's psychological condition was partially traceable to the left wrist injury, but at least in equal amounts was traceable to the other various losses she has experienced severely undermines his opinions on prevailing factor. K.S.A. 2011 Supp. 44-508(g) states that "[p]revailing as it relates to the term 'factor' means the primary factor, in relation to any other factor." If claimant's dysthymic disorder is equally traceable to her left wrist injury, loss of relationships at work, and loss of employment as Dr. Barnett opined, then the left wrist injury cannot be considered the prevailing factor.

Dr. Barnett appears to base his prevailing factor opinion on claimant's assertion that following the left wrist injury she again began having symptoms of depression. He largely ignored the fact that from September 2011 through January 2012, claimant underwent therapy for grief and depression over the death of her mother from Dr. Abbott. The course of treatment being recommended by Dr. Barnett for claimant's psychological condition is the same course of treatment she received in 2004 and following her mother's death. This Board Member finds it significant that during claimant's four visits with Dr. Abbott from September 2011 through January 2012, claimant did not attribute her depression to her left wrist injury. Dr. Barnett minimized the fact that claimant suffered from depression for several years prior to the left wrist injury and took anti-depression medications since at least 2005.

This Board Member is not unmindful of the well established maxim of workers compensation law that uncontradicted evidence which is not improbable or unreasonable will not be disregarded unless it is shown to be untrustworthy.¹⁸ This Board Member finds Dr. Barnett's opinion carries little weight when all the facts are considered. Further, Dr. Barnett's opinion is not uncontroverted. Drs. Hu and Feverly admittedly are not psychological experts, but Dr. Hu was claimant's treating physician and saw claimant several times over a three-month period. Both of those physicians opined claimant's psychological condition pre-existed the left wrist injury. Dr. Hu opined claimant's left wrist injury had no effect on her psychological condition. This Board Member finds Dr. Hu's opinion is credible.

Claimant had many psychological issues that preceded her left wrist injury and was prescribed two anti-depression medications. Claimant again sought treatment for depression when her mother died. It is difficult to understand how Dr. Barnett arrived at the opinion that claimant's left wrist injury was the prevailing factor causing her dysthymic disorder and need for current psychological treatment. This Board Member concludes that claimant failed to prove by a preponderance of the evidence that her left wrist injury was the prevailing factor in causing her psychological condition and her current need for psychological treatment.

¹⁸ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.¹⁹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.²⁰

CONCLUSION

1. The Board does not have jurisdiction to consider whether the ALJ erred in admitting the report of Dr. Barnett as an exhibit at the preliminary hearing.

2. Claimant failed to prove by a preponderance of the evidence that her psychological condition arose out of and in the course of her employment with respondent. Specifically, claimant failed to prove by a preponderance of the evidence that her left wrist injury was the prevailing factor in causing her psychological condition and current need for psychological treatment.

3. The issues raised by claimant concerning temporary total disability payments and Dr. Eyman's appointment as authorized treating physician are not jurisdictional.

WHEREFORE, the undersigned Board Member reverses the April 6, 2012, Preliminary Hearing Order entered by ALJ Sanders.

IT IS SO ORDERED.

Dated this ____ day of July, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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¹⁹ K.S.A. 2011 Supp. 44-534a.

²⁰ K.S.A. 2011 Supp. 44-555c(k).